

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**CITY OF MILWAUKEE FIRE
AND POLICE COMMISSION**

Requesting a Declaratory Ruling Pursuant
To Sec. 111.70(4)(b), Stats., Involving a Dispute
Between Said Petitioner and

**MILWAUKEE POLICE ASSOCIATION
LOCAL NO. 21, IUPA, AFL-CIO**

Case 430
No. 54132
DR(M)-579

Decision No. 29402

Appearances:

Mr. Gregg C. Hagopian and **Ms. Melanie R. Swank**, Assistant City Attorneys, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the City of Milwaukee Fire and Police Commission.

Eggert & Edmonds, S.C., by **Attorney Laurie A. Eggert**, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Police Association.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING**

On May 24, 1996, the City of Milwaukee Police and Fire Commission filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to its duty to bargain with the Milwaukee Police Association, Local No. 21, IUPA, AFL-CIO.

The parties waived hearing and filed written argument, the last of which was received on April 17, 1998.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Milwaukee Fire and Police Commission, herein the FPC, is a municipal employer having its principal offices at 809 North Broadway, Room 104, Milwaukee, Wisconsin 53202.
2. The Milwaukee Police Association, Local No. 21, IUPA, AFL-CIO, herein the MPA, is a labor organization having its principal offices at 1840 North Farwell Avenue, Suite 400, Milwaukee, Wisconsin 53202.
3. The FPC and the MPA have a dispute over the FPC's duty to bargain with the MPA over the pre-employment contract attached to this decision as Appendix "A".
4. The pre-employment contract attached to this decision as Appendix "A" is not primarily related to wages and conditions of employment of employees represented for the purposes of collective bargaining by the MPA.
5. The impact of the pre-employment contract on wages and conditions of employment of employees represented for the purposes of collective bargaining by the MPA is primarily related to wages and conditions of employment.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The pre-employment contract is not a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.
2. The impact of the pre-employment contract on employee wages and conditions of employment is a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING

1. The City of Milwaukee Fire and Police Commission does not have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. with the Milwaukee Police Association over the pre-employment contract.

2. The City of Milwaukee Fire and Police Commission does have a duty to bargain within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats. with the Milwaukee Police Association over the impact of the pre-employment contract on employee wages and conditions of employment.

Given under our hands and seal at Madison, Wisconsin this 26th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

CITY OF MILWAUKEE (POLICE AND FIRE COMMISSION)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECLARATORY RULING**

BACKGROUND

The FPC wishes to adopt a rule regarding selection and appointment of persons to the Milwaukee Police Department which would require job applicants to sign a contract as a condition of being considered for employment. The contract would require the applicant, if hired and retained through Academy training, to repay a portion of the training costs if the employee then leaves the Department before serving at least three years. Payment is due after the employee's departure from the Department.

POSITIONS OF THE PARTIES

The Fire and Police Commission

The FPC contends that it has no obligation to bargain with the MPA over the pre-employment contract.

It argues that because the MPA does not represent the individuals affected by the terms of the contract (i.e. applicants and former employees), the MPA has no right to bargain over the contract's terms. FPC alleges that no employee wages, hours and conditions of employment are affected by the contract.

In the alternative, the FPC asserts that bargaining is prohibited because the contract is an exercise of its exclusive power under Sec. 62.50, Stats. to develop and impose selection and appointment rules.

Should the Commission conclude bargaining is not prohibited, the FPC contends the contract is a permissive subject of bargaining because the public policy and management interests reflected by the contract outweigh any impact on employee wages, hours and conditions of employment.

Should the Commission conclude the contract is a mandatory subject of bargaining, the FPC alleges the existing bargaining agreement with the MPA waives the MPA's right to bargain.

The Milwaukee Police Association

The MPA contends the pre-employment contract is a mandatory subject of bargaining.

It asserts that the contract directly affects employee wages and conditions of employment. Citing the mandatory status of proposals for pensions and other forms of deferred compensation which take effect after the employment relationship has ended, the MPA argues that the absence of a current employment relationship does not automatically remove a topic from the realm of mandatory bargaining. MPA argues that the deferred penalty imposed by the contract arises out of the employment relationship and, as such, is a mandatory subject of bargaining.

The MPA argues that because the impact on employee wages and conditions of employment outweighs any management or public policy interests, the Commission should reject the FPC's argument that the contract is a permissive subject of bargaining. The MPA further asserts that collective bargaining and FPC's statutory rule making powers can be harmonized and thus that bargaining over the contract is not prohibited.

Lastly, the MPA contends that the existing bargaining agreement does not waive its right to bargain over the pre-employment contract and indeed prohibits imposition of such a contract during the term of the agreement.

DISCUSSION

In our view, this dispute is resolved by the fundamental principle that a union cannot compel an employer to bargain over the wages, hours and conditions of employment of individuals who are not in the bargaining unit. CITY OF MADISON, DEC. NO. 16590 (WERC, 10/78); SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, DEC. NO. 17025 (WERC, 5/79); SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 17877 (WERC, 6/80).

The pre-employment contract would be signed by applicants for employment. The MPA does not and cannot represent applicants for employment. For the purpose of collective bargaining, the MPA only has a statutory right to represent **employees**.

The financial obligations of applicants who sign the contract ripen only once the individual is no longer an employee. Because the MPA does not and cannot represent **former** employees for the purposes of collective bargaining, the financial obligations incurred by the applicant who chooses to sign the contract do not provide a persuasive basis for the MPA to assert bargaining rights.

The MPA cites DRUMMOND SCHOOL DISTRICT, DEC. NO. 15909-A (Davis, 3/78), AFF'D BY OPERATION OF LAW (WERC, 4/78), as supportive of its position. However, as argued by the

City, the liquidated damages provision found to be a mandatory subject of bargaining in DRUMMOND applied to **current** employees - not to applicants for employment. Thus, DRUMMOND is distinguishable from the pre-employment contract before us.

MPA also cites a decision of the New York PERB in CITY OF MOUNT VERNON, Case U-6888 (3/85). In that case, it was concluded that the employer could not unilaterally condition an offer to hire upon the prospective employee's willingness to reimburse the employer for training costs. The PERB found such a pre-hire agreement to be a waiver of the individual's Taylor Law right to have the union bargain for him or her on the issue of training costs once the individual actually becomes an employee.

Clearly, the New York PERB decision interpreting New York's Taylor Law is not binding upon us when we interpret Wisconsin's Municipal Employment Relations Act. We also do not find the logic of the PERB decision to be persuasive. A pre-hire agreement **does not** waive the MPA's right to bargain on behalf of **employees** as to wages, hours and conditions of employment. A pre-hire agreement does not alter the contractually-established wages, hours and conditions of employment of unit employees. A pre-hire training cost reimbursement agreement does not deny the MPA the right to address the impact of the agreement on **employees** at the bargaining table. For instance, the MPA could compel the FPC to bargain over a severance pay proposal which would reimburse the departing employee for any costs incurred under a pre-hire agreement. While the MPA has no right to bargain for **applicants**, once the applicant becomes an **employee** the MPA loses no rights to bargain the impact of any pre-hire agreement when it becomes applicable to such **employee**.

Given all of the foregoing, we conclude that the pre-hire agreement attached to this decision as Appendix "A" is not a mandatory subject of bargaining. However, we further conclude that the MPA has the right to bargain over the impact of the proposed pre-hire agreement on **employees** it represents for the purposes of collective bargaining.

Dated at Madison, Wisconsin, this 26th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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